

ELECTION COMMISSION OF INDIA
Nirvachan Sadan, Ashoka Road, New Delhi – 110001.

ORDER

It was brought to the notice of the Commission on April 4, 2007, that some leaders including Shri Lalji Tandon, and workers of the Bharatiya Janata Party ('BJP' for short), a recognized National party under the provisions of the Election Symbols (Reservation and Allotment) Order, 1968 ('Symbols Order' for short), released and distributed an election campaign C.D. which contained derogatory references hurting the sentiments of a certain community. The Commission considered the issue, the contents of the C D in question and observed that the same contained material, both audio and video, which could cause or aggravate differences and/or create mutual hatred or cause tension between different castes and communities, and contained an appeal to caste or communal feelings for securing votes. The Commission considered this action as, prima facie, amounting to violation of the following provisions of the Model Code of Conduct: -

- "(i) No party or candidate shall indulge in any activity which may aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religions or linguistic.
- (ii) Criticism of other political parties, when made, shall be confined to their policies and programmes, past record and work. Parties and candidates shall refrain from criticism of all aspect of private life, not connected with the public activities of the leaders or workers of other parties. Criticism of other parties or their worker based on unverified allegations or distortion shall be avoided.
- (iii) There shall be no appeal to caste or communal feelings for securing votes. Mosques, Churches, Temples or other places of worship shall not be used as forum for election propaganda."

2. The Commission took suo motu notice of the matter, and asked the Chief Electoral Officer, Uttar Pradesh, vide letter 56/UP-LA/2007, dated 5.4.2007, to file an FIR against (i) the President of Bharatiya Janata Party, (ii) Shri Lalji Tandon, (iii) all those responsible for

production of the C.D. including those who acted in it and wrote the script of the same, and (iv) all those involved in the release, distribution and display of the C.D.

3. The Commission also issued a Show Cause Notice on the same day i.e. 5.4.2007, to the Bharatiya Janata Party asking the party as to why action should not be taken against it under para 16A of the Symbols Order, for violating the provisions of the Model Code of Conduct.

4. The Chief Electoral Officer, Uttar Pradesh intimated vide his letter No. 2224/CEO-1, dated 06.04.2007 that an FIR No. 265/07 had been filed against the Bharatiya Janata Party on 06.04.2007 at Police Station, Kotwali, Hazratganj, Lucknow under Sections 153A, 153B and 505 of the Indian Penal Code, 1860 and clauses (3) and (3A) of Section 123 and Section 125 of the Representation of the People Act, 1951.

5. In response to the Commission's Show Cause Notice dated 05.04.2007, the BJP filed its reply on 06.04.2007. The Party stated that it had not produced, prepared, displayed or distributed the impugned C.D. and that the said C.D. was not part of the official campaign material of the BJP. The reply further stated that the party leaders had not seen or approved the said C.D. and that at a Press Conference in Lucknow on 03.04.2007, Shri Lalji Tandon, MLA and leader of the party in Uttar Pradesh, displayed certain campaign material to the media, which was part of the party's campaign material and the impugned C. D., which was not prepared by the party but by some individuals, was put in the kit by someone in the office. The reply further stated that the party enquired into the matter and has since removed Shri Manoj Mishra from the responsibility of the party's spokesperson. The party further stated that the essential pre-requisite for invoking Para 16A of the Symbols Order is that the breach complained of must be a breach by a political party, which is not made out in this case. The bonafides of the party are evident from the fact that even before a complaint was filed before the Commission, the party had suo motu taken action clarifying and withdrawing the C.D. and dissociated itself from it. The party, therefore, requested that the notice issued to them may be withdrawn.

6. In the meantime, the Jan Morcha, a registered un-recognised party, and three National parties, viz. Bahujan Samaj Party('BSP'), Communist Party of India (Marxist) ('CPM') and Indian National Congress('INC'), submitted applications seeking intervention in

the matter. A delegation on behalf of the Jan Morcha also met the Commission on 05.04.2007. They requested that recognition granted to Bharatiya Janata Party be withdrawn immediately and further criminal action be taken against the party and its leaders under the Criminal Procedure Act for fanning communal violence in the country. The BSP prayed that the registration granted to the BJP under Section 29A of the Representation of the People Act, 1951 and also the recognition granted to the BJP be withdrawn. The CPM requested the Commission to take firm action against the BJP and a hearing be given to the representatives of the party before disposing of the case. The INC also sought withdrawal of recognition of the BJP and that all those individuals of BJP who participated directly or indirectly in the conceptualization, release, supply of the material to the producers for production and dissemination of the C.D. be debarred from participating in the electoral process, and also requested that the Commission may order an inquiry by the CBI into the issue. They also requested for a personal hearing in the matter.

7. The Commission considered the aforesaid reply given on 6.4.07 by Shri Mukhtar Abbas Naqvi, National Vice-President, Bharatiya Janata Party and the representations filed by Jan Morcha, BSP, CPM and INC. Having considered all aspects of the issue, the Commission decided to afford an opportunity of personal hearing to all the five parties. Accordingly, a hearing was fixed on 09.04.2007 at 11.00 A.M.

8. As scheduled, the matter was taken up for hearing on 09.04.2007 at 11.00 A.M. The representatives of Bharatiya Janata Party, Bahujan Samaj Party, Indian National Congress, Communist Party of India (Marxist) and the Jan Morcha appeared for the hearing.

9. Shri Arun Jaitley, learned Senior Counsel appearing on behalf of the Bharatiya Janata Party submitted that the copies of the letter filed by the Indian National Congress and the Communist Party of India (Marxist) were served at the Party Head-Quarter only late in the evening of 08.04.2007, and the same were seen by the party leaders in the morning of 09.04.2007. He stated that if the Commission wanted the response of the party to the said letters also, they needed time to file the same. Shri Jaitley submitted the reply of the party to the letters filed by the Bahujan Samaj Party and the Jan Morcha. He handed over a copy of the replies to the representatives of the Bahujan Samaj Party and the Jan Morcha.

10. Shri Jaitley also handed over an application requesting that one of the members of the Commission Shri Navin B. Chawla may recuse himself from hearing the matter.

11. Shri Kapil Sibal, learned Senior Counsel appeared on behalf of the Indian National Congress, and submitted that it would be better to have the reply of the Bharatiya Janata Party to their letter before hearing the matter. The Commission thereupon adjourned the hearing to 11.04.2007.

12. The matter was taken up on 11.04.2007, as scheduled. At the outset, Shri Arun Jaitley, learned Senior Counsel, of the BJP adverted to his application submitted on 09.04.2007 on the issue of recusal of one of the members of the Commission and made detailed submissions on the issue. Shri Kapil Sibal, learned Senior Counsel of the INC submitted that they were not furnished with a copy of the application for recusal submitted on behalf of the Bharatiya Janata Party and requested that a copy be given to them to enable to respond to the application. The Commission directed that a copy be given to all other parties and adjourned the matter to 12.04.2007. Shri Jaitley also filed the reply of the BJP to the representation of the INC. In the reply, the BJP stated that the entire proceedings before the Commission arose out of an alleged violation of Model Code of Conduct by the BJP on 3.4.07 and that any reference in the petition dated 08.04.2007 filed by the Indian National Congress to facts or situations prior in time to the coming into force of the Model Code of Conduct in the present case on 21.2.07, need not be gone into by the Commission. He also submitted that the prayer regarding investigation by the CBI cannot be allowed without the consent of the relevant State Government under Section 6 of the Delhi Special Police Establishment Act, 1946. The party further submitted that it filed a detailed reply dated 06.04.2007 to the notice received from the Commission which may also be considered as part of this reply, filed by the party on the petition of Indian National Congress. It was reiterated that the C.D. in question was not a part of the campaign material of the Bharatiya Janata Party and it was not authorised or produced by the Bharatiya Janata Party. It was also stated that Shri Rajnath Singh, Shri Kesrinath Tripathy and Shri Venkaiah Naidu have nothing to do with the release of the alleged C.D. Shri Tandon had already explained that he was unaware of the contents of the impugned C.D. and apologized for being dragged into/having released the un-authorised C.D. He had also clarified his position of not being aware of the said C.D. since the same was put in the kit where the official C.Ds. were required to be released. It was requested that the petition of Indian National Congress be dismissed.

13. On 12.04.2007, Shri Kapil Sibal made his submissions on the application for recusal filed by the BJP. The learned counsel/representatives of the BSP, CPM and Jan Morcha also

made their oral submissions on the said application. Shri Arun Jaitely made his rejoinder submissions. At the conclusion of their submissions on 12.4.07, the Commission indicated that a decision on the application for recusal would be given by 19.04.2007.

14. On the said application of the BJP seeking recusal by one of the Members of the Commission from hearing the matter, the Commission passed an order on 19.04.2007, holding that the Commission saw no reason to constitute a bench of only two Commissioners, and decided that all the three members of the Commission would hear the matter further and adjudicate on it.

15. After that disposal of the preliminary issue, Shri Kapil Sibal, learned Senior Counsel of the INC made his detailed submissions. He stated that the investigation being made in pursuance of the FIR would reveal the names of the persons involved in the production and distribution of the impugned C.D., and the issue of withdrawal of recognition would depend on the outcome of that investigation. He submitted that there were no two opinions that the contents of the CD were outrageous and unacceptable. He submitted that the Commission should pass orders under its plenary powers Article 324 of the Constitution restraining the individuals who were involved in the preparation, release, or circulation of the CD from participating in the election process in any capacity. He also submitted that the Commission may pass some interim administrative order prohibiting dissemination, exhibition of the CD in any form. Shri Sibal also submitted that the Commission has the power under Article 324 to order an enquiry by the CBI into the whole issue of preparation and distribution of the CD.

16. Shri Nilotpal Basu, appearing on behalf of the CPM, stated that there should be an Administrative Order asking Bharatiya Janata Party to publicly condemn the C.D. and tender public apology.

17. Shri Pravin Bhati, learned counsel for the BSP stated that what was vital was the perception of common man and their perception was that this was the campaign material of the BJP. He requested the Commission to issue a direction to ban the C.D. and suspend the allotment of the reserved symbol of the party.

18. Shri R.S.Suri, learned counsel for the Jan Morcha stated that the supply of C.D. to media was deliberate and the party was responsible for its internal administration and

discipline of its members. The recognition of Bharatiya Janata Party should be suspended and investigation should go as fast as possible.

19. Shri Arun Jaitley, learned Senior Counsel of the BJP submitted at the outset a caveat that submissions made by him on merit should not be treated as the party's acceptance of the decision of the Commission on the preliminary application seeking recusal by one of the members of the Commission. He added that Para 16A of the Symbol Order had not been judicially tested and he had the right to question the validity of para 16A. If para 16A is abused in a particular manner, it could lead to a situation where multi-party system could be sabotaged. He submitted that the Model Code of Conduct covers a number of aspects, some of them very trivial. According to him, every political party raises different issues, follows different principles, and it is for the electors to decide on the pros and cons of the issues, and the Commission should not act as the ombudsman for deciding the appropriateness of the political principles of the parties. He submitted that the Commission should consider the implications and consequences and, in any event, the principle of 'proportionality' before invoking the provisions of para 16A of the Symbols Order. He also stated that the Commission cannot debar individuals from contesting an election. Power in relation to preventing a person from contesting Lok Sabha Election is circumscribed by Article 102 of the Constitution of India. Similarly, the power in relation to preventing a person from contesting Assembly election is circumscribed by Article 191 of the Constitution of India. Shri Jaitley submitted that the power of the Commission under Article 324 of the Constitution of India to conduct free and fair election is subject to the limitation of constitutional provisions and enacted legislations; that Article 324 of the Constitution cannot be invoked in relation to occupied space; that the right to contest election is occupied space as held by the Supreme Court in *M.S. Gill Vs. CEC & Others* (1978(1)SCC 405); that article 324 can only supplement a law as held by the Supreme Court in *A.C. Jose Vs. Sivan Pillai & others* (1984(2) SCC 655).

20. Shri Jaitley further stated that maintenance of law and order and investigation of crime is a State subject. He stated that the Central Bureau of Investigation was created as investigation agency under the Delhi Police Establishment Act, 1946 and the State concerned has to consent for a CBI inquiry.

21. At the conclusion of the hearing, the Commission directed the parties to file their written submissions, if they so desired by 21st April 2007. The Indian National Congress filed its written submissions in response to the submissions made by the Bharatiya Janata Party. It was stated therein that the contention of Bharatiya Janata Party that power under paragraph 16A of the Symbols Order should not be exercised by the Commission, because it is liable to be misused at the instance of the party in power, is an argument of desperation. The possibility of misuse of any provision of law cannot be made the basis of non-existence of power. Para 16A being a part of the Symbols Order, is the source of power to be used against a political party in such circumstances as this Commission may deem fit and appropriate. Any statutory power vested in an authority is capable of being misused, but that by itself does not render that provision unconstitutional. According to him, Para 16A of the Symbols Order does not deal with situations where individuals belonging to a political party can be proceeded against for violation of the Model Code of Conduct. Para 16A of the Symbols Order applies to proceedings against political parties for withdrawing recognition or suspending recognition. As far as individuals are concerned, the learned senior counsel for the Indian National Congress contended that the source of power is not paragraph 16A, but Article 324 of the Constitution. The scheme of the Constitution read with the Representation of the People Act, 1951 is clear. The Representation of the People Act, 1951 is a law framed to deal with situations arising before the commencement of the election and situations arising after the declaration of result of an election. Article 324 and Model Code of Conduct framed under it, read with the Symbols Order, deal with situations from the date of announcement of the schedule of election to the declaration of the result. Consequently, all situations during that period are to be dealt with under Article 324 and the Model Code of Conduct which is now made enforceable. The argument by the learned counsel for the Bharatiya Janata Party that the scheme of the Constitution does not permit any coercive action qua individuals and political parties while the process of election was on, is contrary to the powers vested in the Commission under Article 324 of the Constitution and Model Code of Conduct read with Symbols Order, intended to ensure free and fair poll. A free and fair poll is the essence of democracy and an argument, which takes away the authority of the Commission to lay down standards for a free and fair poll, is a threat to the democratic process. He has further submitted that the observations by the Supreme Court both in *M.S. Gill Vs. CEC & others* (1978(1) SCC 405 at 431 & 452) and *A.C. Jose Vs. Sivan Pillai & others* (1984(2) SCC 656 at 665, 666 & 668) support the propositions of law advanced on behalf of the INC.

22. As far as handing over the investigation to the CBI, the learned senior Counsel of the INC submitted that the argument of the learned Counsel for Bharatiya Janata Party that under the provisions of the Delhi Special Police Establishment Act, 1946, the permission of the State Government was necessary on the ground that the issue relates to the matter of law and order in the State is completely erroneous. The power of handing over the investigation in the present case to the CBI is not with reference to a law and order issue, but with reference to the issue of participation in the democratic process, through a free and fair poll. It was further submitted that the admission by the learned Counsel of Bharatiya Janata Party that the party had made a mistake and that the impugned C.D. had been withdrawn, was inconsistent with subsequent statements by the leaders of Bharatiya Janata Party defending the C.D. He has stated that the impugned C.D. is being secretly distributed and displayed in various parts of Uttar Pradesh and there has been no clear and direct apology made by the party either in Uttar Pradesh or outside Uttar Pradesh. In this context, the doctrine of proportionality cannot be taken aid of.

23. The Bahujan Samaj Party also filed a written submission in response to the submission made by Bharatiya Janata Party. It was submitted that the Bharatiya Janata Party by its act of releasing the C.D. had indulged in such activities as are opposed to the principles of democracy and secularism to which it had shown its commitment under Section 29A of the Representation of the People Act, 1951 at the time of registration. All State leaders were advocating in favour of the impugned C.D. on TV Channels, which revealed the true intention of the BJP. In these circumstances, a prima-facie case was made out for de-recognizing the Bharatiya Janata Party as a National Party under Para 16A of the Symbols Order and pass such other orders as may be deemed necessary to protect the democracy in the country.

24. The Commission has considered the issues involved and the contentions of all the parties. We will first deal with the request for CBI inquiry and the request of the INC for restraining the persons involved in the preparation, release and circulation of the CD from participating in the election process.

25. Under the provisions of Section 6 of the Delhi Special Police Establishment Act, 1946, the State Government is the authority to entrust investigation into any matter to the CBI. The Commission agrees with the contention of Shri Jaitley on this aspect. In view of the provisions in the Delhi Special Police Establishment Act, 1946, it will not be appropriate

for the Commission to direct, under Article 324, an investigation by the CBI in this matter. Therefore, the request for 'directing' an inquiry by the CBI cannot be considered. However, the Commission will assess the situation based on the progress of the investigation that is going on and decide on appropriate course of action at a later stage if the situation so warrants.

26. As regards the other request made by the INC, for disqualifying the persons involved in the episode from participating in the election process or for holding themselves as candidates, the Constitution and the law have laid down in clear terms the grounds on which a person is disqualified from contesting election. Similarly, the qualifications that have to be fulfilled by a person for contesting elections are also clearly specified under the Constitution and the law. It is not within the powers of the Commission to add to those qualifications and disqualifications laid down in the law. It is a well settled principle that Article 324 empowers the Commission to supplement the law to deal with a situation which is not covered under existing legislation. The issue of qualifications and disqualifications being areas covered under clearly laid down provisions of the Constitution and the law, the question of any direction under Article 324 to debar any person from contesting an election, if he is qualified and is not disqualified under the Constitution and the law, does not arise.

27. In so far as the prayer for issuing an administrative order banning the use of the impugned C.D. is concerned, the Commission vide its letter dated 12th April 2007 asked the Chief Electoral Officer, Uttar Pradesh to direct all District police authorities to ensure that no distribution/circulation/exhibition of the above C.D., clandestine or otherwise, takes place anywhere in the State of Uttar Pradesh and that its contents are not disseminated/displayed/exhibited in any form by any one and that if any one was found indulging or involved in such clandestine distribution/release/display/exhibition/dissemination of the C.D. or its contents, the offenders should be immediately apprehended and proceeded against under the law and the offending copies of the C.D. seized forthwith.

28. Now, having disposed of the preliminary as well as secondary issues raised either by the complainant parties or by the respondent party, the primary issue which needs to be

determined by the Commission is what action can be, and/or should be, taken by the Commission under para 16A of the Symbols Order in view of the aforesaid CD.

29. In so far as the question as to what action can be taken by the Commission under para 16A of the Symbols Order is concerned, it is answered by that paragraph itself. Even at the cost of repetition, the said paragraph is reproduced below for ready reference:-

“16A. Power of Commission to suspend or withdraw recognition of a recognised political party for its failure to observe Model Code of Conduct or follow lawful directions and instructions of the Commission –

Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National party or as a State party under the provisions of this Order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise (a) to observe the provisions of the ‘Model Code of Conduct for Guidance of Political Parties and Candidates’ as issued by the Commission in January, 1991 or as amended by it from time to time, or (b) to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, the Commission may, after taking into account all the available facts and circumstances of the case and after giving the party reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party as the National Party or, as the case may be, the State Party.”

30. A plain reading of the above paragraph shows that the Commission, under that paragraph, can (i) suspend the recognition of a National or State party subject to such terms as the Commission may deem appropriate, and/or (ii) withdraw the recognition of such party as National party or State party, if the Commission is satisfied on information in its possession that the party has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise to observe the provisions of the Model Code of Conduct or to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular.

31. The learned senior counsel for the respondent party contended that the said para 16A was unconstitutional and ultra vires of the Constitution as it conferred unbridled powers to the Commission, capable of being misused and abused in a manner which could lead to a single party system causing serious prejudice to the democratic structure. It may, however, be stated that the learned senior counsel has himself conceded that the above proposition in regard to the constitutionality of the said paragraph 16A was still to be tested by a judicial forum having jurisdiction in this behalf, and not by the Commission itself. In so far as the Commission is concerned, the said para 16A is perfectly constitutional and has been devised by the Commission with a view to ensuring that the political parties which are granted recognition, not under any statute but under the Symbols Order promulgated by the Commission's under its own plenary powers of Article 324, must conduct themselves in a manner whereby they uphold the principles of democracy, socialism and secularism which they have undertaken to adhere to and uphold, while seeking registration as a political party under the law. The recognition of a political party by the Commission carries with it not merely the reservation of a symbol for it but also enjoyment of several facilities and concessions at huge cost to the public exchequer which are not available to the other

registered unrecognised parties.. The provisions of paragraph 16A are thus in conformity with the avowed purpose of ensuring highest principles of electoral practices to be followed by the recognised political parties and setting an example by their exemplary conduct of their election campaigns. The Commission is charged by the Constitution of a sacred responsibility of conducting free and fair elections and thereby strengthening democracy and a provision made by it, like the one in paragraph 16A, to achieve that objective can by no stretch of imagination be considered as unconstitutional or ultra vires the Constitution.

32. As regards the second limb of the question as to what action should be taken by the Commission in the present case, the learned senior counsel for the respondent is right in his contention that the powers of the Commission under para 16A of the Symbols Order have to be exercised sparingly and having regard to the principle of 'proportionality'. This thus brings us to the question of preparation, production, distribution and dissemination of the CD under reference. It is not disputed by any party – nay, even conceded by the respondent party – that the contents of the said CD are undoubtedly highly inflammatory, derogatory to the sentiments of a particular religious community and having the effect of aggravating the differences or creating mutual hatred or causing tension between different castes and communities, religious or linguistic, and contain an appeal to communal feelings for securing votes. It will be highly undesirable on the part of the Commission to reproduce any part of the contents of that CD – the less said about those contents, the better it is in the overall interests of communal harmony and purity of elections. Suffice to say that the material contained and depicted in that CD is grossly violative of the principles of secularism, apart from the principles of democracy and socialism, to which this country is wedded, as solemnly affirmed in the very preamble to the Constitution of India.

33. Emphasising the principle of secularism and the role of political parties which they expected to play in adhering to that principle in their conduct and election campaigns, a Constitution Bench of the Supreme Court observed in *S.R. Bommai and others Vs. Union of India and others* AIR 1994 SC 1918 as follows:-

[per Ramaswamy, J.(Ahmadi, J., as he then was, concurring)]

“For a political party or an organisation that seeks to influence the electorates to promote or accomplishing success at an election for governance of parliamentary form of government, the principles are those embedded in the Directive Principles of the Constitution vis-a-vis the Fundamental Rights and the Fundamental Duties in Part IV A and should abide by the Constitution and promote tolerance, harmony and the spirit of commonness amongst all the people of India transcending religious, linguistic, regional or sectional diversities and to preserve the rich heritage of our composite culture, to develop humanism, spirit of reformation and to abstain from violence. Therefore, the manifesto of a political party should be consistent with these fundamental and basic features of the Constitution, secularism, socio-economic and political justice, fraternity, unity and national integrity.

‘Under Section 29-A of the Representation of the People Act, 1951 for short 'R. P. Act' registration of a political party, or a group of individual citizens of India calling itself a political party has been given the right to make an application to the Election Commission constituted under Article 324 for its registration as political party with a copy of the memorandum or rules or regulations of the association or the body signed by its Chief Executive Officer. The application shall contain a specific provision that the association or the body shall bear true faith and allegiance to the Constitution of India as by law established and its members shall be bound by socialism, secularism and democracy and would uphold the sovereignty and integrity of India. It is, therefore, a mandatory duty of every political party, body of individuals

or association and its members to abide by the Constitution and the laws; they should uphold secularism, socialism and democracy, uphold sovereignty and integrity of the nation. Section 123 (3) prohibits use of religion or caste in politics and declares that the promotion or attempt to promote violence and hatred between different classes of citizens of India on grounds of religion and caste for the furtherance of the prospects at the election of the candidate or for affecting the election of any candidate was declared to be a corrupt practice. As per Ss. (3-A) of Section 123 the promotion of, or attempt to promote feeling of enmity or hatred between different classes of Indian citizens on grounds of religion, etc. by a candidate, his election agent or any person with his consent to further the election prospects of that candidate or for prejudicially affecting the election of any candidate was declared as corrupt practice. A political party, therefore, should not ignore the fundamental features of the Constitution and the laws. Even in its manifesto with all sophistication or felicity of its language, a political party cannot escape constitutional mandate and negate the abiding faith and solemn responsibility and duty undertaken to uphold the Constitution and laws after it was registered under Section 29-A. Equally it/they should not sabotage the same basic features of the Constitution either influencing the electoral process or working the Constitution or the law. The political party or the political executive securing the governance of the State by securing majority in the legislature through the battle of ballot throughout its tenure by its actions and programmes, it is required to abide by the Constitution and the laws in letter and spirit.

‘Article 25 inhibits the government to patronise a particular religion as State religion overtly or covertly. Political party is, therefore, positively enjoined to maintain neutrality in religious beliefs and prohibit practices derogatory to the Constitution and the laws. Introduction of religion into politics is not merely in

negation of the constitutional mandates but also a positive violation of the constitutional obligation, duty, responsibility and positive prescription of prohibition specifically enjoined by the Constitution and the R. P. Act. A political party that seeks to secure power through a religious policy or caste orientation policy disintegrates the people on grounds of religion and caste. It divides the people and disrupts the social structure on grounds of religion and caste which is obnoxious and anathema to the constitutional culture and basic features. Appeal on grounds of religion offends secular democracy.”

34. In the same case, Jeevan Reddy and Aggarwal, JJ further observed:

“Given the above position, it is clear that if any party or organisation seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution it would certainly be guilty of following an unconstitutional course of action. Political parties are formed and exist to capture or share State power. That is their aim. They may be associations of individuals but one cannot ignore the functional relevance. An association of individuals may be devoted to propagation of religion; it would be a religious body. Another may be devoted to promotion of culture; it would be a cultural organisation. They are not aimed at acquiring State power, whereas a political party does. That is one of its main objectives. This is what we mean by saying "functional relevance". One cannot conceive of a democratic form of government without the political parties. They are part of the political system and constitutional scheme. Nay, they are integral to the governance of a democratic society. If the Constitution requires the State to be secular in thought and action, the same requirement attaches to political parties as well. The Constitution does not recognise, it does not permit, mixing religion and State power. Both must be kept apart. That is the constitutional injunction. None can say otherwise so long as this Constitution governs this country. Introducing religion into politics is to introduce an

impermissible element into body politic and an imbalance in our constitutional system. If a political party espousing a particular religion comes to power, that religion tends to become, in practice, the, official religion. All other religions come to acquire a secondary status, at any rate, a less favourable position. This would be plainly antithetical to Articles 14 to 16, 25 and the entire constitutional scheme adumbrated hereinabove. Under our Constitution, no party or organisation can simultaneously be a political and a religious party. It has to be either. Same would be the position, if a party or organisation acts and/or behaves by word of mouth, print or in any other manner to bring about the said effect, it would equally be guilty of an act of unconstitutionality. It would have no right to function as a political party.”

35. Sentiments to the same effect have been expressed by the Apex court in a catena of other cases too. For instance, another Constitution Bench of the Supreme Court observed in *Dr. M. Ismail Faruqui v. Union of India*, (1994) 6 SCC 360: (1994 AIR SCW 4897), (Ayodhya case), summarised the true concept of secularism under the Indian Constitution as under:

“it is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touch-stone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.”

36. Explaining the meaning and object of clause (3A) of section 123 of the Representation of the People Act, 1951 which makes the ‘promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community or language’ a corrupt practice at elections, the Supreme Court observed in *Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte* AIR 1996 SC 1113, 1996(1)SCC130 as follows:-

“The provision is made with the object of curbing the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies. The provision in the P. C. as well as in the R. P. Act for this purpose was made by amendment at the same time. The amendment in the R. P. Act followed amendments made in the Indian Penal Code to this effect in a bid to curb any tendency to resort to divisive means to achieve success at the polls on the ground of religion or narrow communal or linguistic affiliations. Any such attempt during the election is viewed with disfavour under the law and is made a corrupt practice under sub-section (3a) of Section 123.”

37. Viewed in the context of the above illuminating observations of the Supreme Court, there can be no two opinions that the contents of the CD under reference deserve to be condemned in the strongest terms. The stand in regard to the said CD taken by the respondent party in its reply dated 6th April, 2007, is to the following effect:-

- “(1) The BJP has not produced, prepared, displayed or distributed the impugned CD. The CD does not form a part of official campaign material of BJP.
- (2) The CD has not been seen or approved by the leadership of the BJP.
- (3) At a press conference in Lucknow on 3rd April, 2007, Shri Lalji Tandon, an MLA and leader of the party in Uttar Pradesh, displayed certain campaign

material of the media which was an integral part of the party's campaign. The impugned CD, which was not prepared by the party but by some individuals, was put in kit by someone in the office.

- (4) The party inquired into the matter and has since removed Shri Major Mishra from the responsibility of a Spokesman.

As soon as this mistake was brought to the notice of the party and Shri Lalji Tandon, the part on 4th April, 2007 itself issued a statement clearly stating that the CD was not a party of the party's campaign material and had been erroneously put in the kit containing the other publicity material. Even the mistaken act of releasing unauthorized CD was revoked by officially withdrawing the CD itself. Shri Lalji Tandon also issued a similar clarification and expressed an unqualified regret for this mistake. These reports have already been published in the newspapers on the 5th April, 2007 thereby confirming that the acceptance of the error and the withdrawal of the unauthorized CD had already taken place on 4th April, 2007 itself. It is relevant that the party had unilaterally acted in good faith in consonance with the Code of Conduct and its commitment for standards in public life, had issued the above clarification even before anybody could complain to the Election Commission or the notice of the Election Commission. Copies of the press statements appearing in the newspaper and the statement of the BJP and Shri Lalji Tandon are annexed as to this reply."

38. The same stand as contained in the party's reply dated 6th April, 2007 was maintained and reiterated by the learned senior counsel of the respondent party in his oral submissions at the hearings held by the Commission on 11th, 12th and 19th April, 2007. However, the learned senior counsel for the INC and the learned counsels/representatives for the other complainant

parties, viz., BSP, CPI(M) and Jan Morcha, submitted that the respondent party was trying to mislead the Commission on this issue of having disowned the CD. They pointed out that several important leaders of the party, including Shri Kalyan Singh, Shri Lalji Tandon and even Shri L.K. Advani, had publicly stated that there was nothing offensive in the said CD and have, on the other hand, shown their support for the contents of the CD by their utterances, both through the print media and also on electronic media. Even the Commission has seen some press reports as well as reports in certain TV channels of the statements being made by the leaders of the respondent party defending the contents of the CD. Certainly, this has created a doubt – a genuine doubt – in the minds of the general public whether the respondent party has disowned the CD and condemned its contents or stands by its contents and defends the same. A vociferous demand was made by the learned counsels for the complainant parties that the least the respondent party could do consistently with its stand taken before the Commission, it should publicly condemn the contents of the CD and tender an unqualified apology to the country for having distributed/disseminated the CD under reference, even if by mistake as contended by them.

39. The Commission sees quite a force in the above submissions and the demand of the learned counsels for the complainant parties. When the respondent party has categorically stated before the Commission, both in their oral arguments as well as in the written submissions, that they do not approve of the contents of the CD, the respondent party should come out with an unequivocal and unambiguous declaration that they strongly condemn the contents of the CD. Accordingly, the Commission hereby directs that the respondent party should make an official declaration on behalf of the party at the national level that the party condemns, without any reservation whatsoever, the contents of the CD under reference so that the stand taken by the party before the Commission becomes publicly known to the country and public at large and any misgivings or apprehensions in their minds arising out of

the distribution / dissemination of the said CD or its contents stand dispelled and removed forthwith. Such declaration of the respondent party should be made urgently on the receipt of this order by them and given wide publicity by them, both in the print and electronic media, at the national level as well as at the local level particularly in the State of Uttar Pradesh. A compliance report in this behalf should be sent by the respondent party to the Commission by 15th May, 2007.

40. The Commission would, however, like to make it clear to all concerned in the matter that the matter is not being closed by the Commission with the present order. As pointed out above, the respondent party has taken the stand before the Commission that the party at the national level had no role in the preparation or production or distribution or dissemination of the CD and that it was produced by some local functionaries of the party at the State level without approval of the leaders of the party at the national level. The production and dissemination of the CD has been termed by the party as misadventure on the part of certain local functionaries of the party. The learned senior counsel of the party submitted that the action under para 16A of the Symbols Order should be taken against the party only if it has done any wrong qua the party and not because of certain unauthorised acts having been committed by a few local functionaries without the approval or knowledge of the national leadership. The party has invoked the principle of proportionality for any punitive action being taken by the Commission under the said para 16A. Though the Commission is of the opinion that the party consists of the members and it cannot absolve itself of the responsibility if its members and functionaries, particularly those holding responsible positions in the party hierarchy, indulge in acts and activities which are not only violative of the principles enshrined in the Constitution of India but are also violative of the penal provisions of the law, like, Indian Penal Code, Representation of the People Act, 1951, etc. The Model Code of Conduct specifically prohibits the parties from indulging in such

objectionable acts of commission and omission. It is relevant to point out in this context that an FIR No. 265/07(230/07) dated 6th April, 2007 has been already lodged with the police authorities of Hazratganj Police Station at Lucknow in Uttar Pradesh and the police authorities of the State Government are making investigation into all relevant aspects of production and distribution of the CD and as to who are responsible for production, writing of the manuscript, approval of the contents, the role played by various functionaries of the respondent party in its distribution and dissemination, and the like. Therefore, the Commission reserves its right to take further action under para 16A of the Symbols Order against the respondent party after the completion of those investigations by the State police authorities and if it reveals the involvement of the leaders of the party at the national or state level in the production, distribution and dissemination of the CD. The Commission will be reviewing the progress of the case from time to time for appropriate action.

(Dr S.Y. Quraishi)
Election Commissioner

(N. Gopaldaswami)
Chief Election Commissioner

(Navin B. Chawla)
Election Commissioner

New Delhi
8th May, 2007